United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2085

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. IRVING ANOLIK, on behalf of SHELDON SELIKOFF,

Petitioner-Appellee,

-against-

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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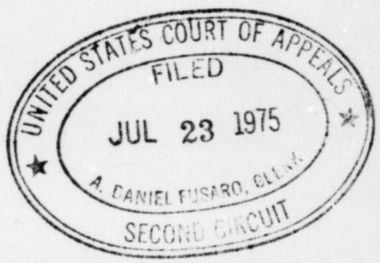

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

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BRIEF FOR APPELLANT

Statement

This is an appeal by the State Commissioner from an order of the United States District Court for the Southern District of New York (Bonsal, J.) dated April 21, 1975 granting a petition for a writ of habeas corpus. On motion by the State Commissioner for a stay of the District Court's order, this Court, by order dated June 24, 1975 directed that appellee be released on bail pending determination of the appeal. On June 26, 1975, the District Court directed appellee's release on bail.

Question Presented

Where a plea follows a promise by the Court not to impose a jail sentence based on the information before the Court is due process satisfied by the Court at the time of sentence advising the defendant that upon the basis of later information justice requires the imposition of a jail sentence and affording the defendant an opportunity to withdraw the plea or does it require, upon such circumstances, the Court itself to vacate the plea sua sponte over the objection of the defendant, as the district court held?

Prior Proceedings

On August 16, 1972 at a term of the County Court, Westchester County, appellee was sentenced to state prison for a maximum term of five years after being convicted of the crimes of grand larceny in the second degree and obsenity in the second degree upon his pleas of guilty.* The judgment

* The District Court states that "the papers indicate that petitioner has served at least two and a half years of the indeterminate term of up to five yea to which he was sentenced." (Appendix, p. 135). The statement is incorrect. Execution of the sentence was stayed until January 3, 1975. When the District Court's opinion was rendered, appellee had served approximately 3 1/2 months, not 2 1/2 years.

of conviction was affirmed by the Appellate Division, Second Department with opinion and dissenting opinions at 41 A D 2d 376. The New York Court of Appeals affirmed with opinion at 35 N Y 2d 227 (Breitel, Ch. J.). Petition for certiorari was denied 43 U.S.L.W. 3404.

On May 12, 1972, appellee had withdrawn his pleas of not guilty and entered a plea of guilty to grand larceny in the second degree under the first court of indictment 997/70. At the same time he entered a plea of guilty to obsenity in the second degree under the second count of indictment 606/70. The pleas were entered in full satisfaction of indictment 606/70 and of indictment 997/70. Additionally, the pleas were entered in full satisfaction of indictment numbers 998/70 and 999/70. The latter three indictments contained 38 counts arising out of a complicated real estate swindle.

At the time the pleas were entered, the judge said that based on the facts and representations made by the District Attorney's office and defense counsel, it was his opinion that appellee's incarceration was not required. See the Minutes of May 12, 1972 which show the following:

> "THE COURT: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the

results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?

SHELDON SELIKOFF: Yes, sir.

. . .

THE COURT: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?

SHELDON SELIKOFF: Yes, sir.

THE COURT: I will not answer as to what other punishment I shall impose, I will reserve to that." (Appendix, pp. 107-109).

At the time the pleas were entered, the judge was not aware of the extent of appellee's participation in the fraudulent scheme. Subsequently, he presided at the trial of the several co-defendants at which it appeared that appellee was a principal participant in the fraud. Furthermore, the pre-sentence report indicated that appellee denied participation in any fraud and denied any guilt involving acts of sexual impropriety. Accordingly, the court informed appellee that it could not keep the promise of no incarceration and gave him the opportunity to withdraw the pleas. See the Minutes of August 16, 1972 in which the court stated:

"THE COURT: . . .At the time that such pleas were entered, this Court was not aware nor was it advised as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.

This Court therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.

Subsequent to this expression of view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this count of the indictment, as well as the other larcenies alleged in the other indictments, Indictment 908 of 1970 and 999 of 1970, involving thousands of dollars was not peripheral subordinate or minor but rather major and as a principal participant in the fraud.

In light of these facts and circumstances, the Court feels at this time that it cannot in good conscience and in the interests of justice keep the promise here as to no incarceration.

Furthermore, it appears from your presentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.

> Again, in regard to the indictment charging you with sexual impropriety, you, according to the pre-sentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.
>
> Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated and that you be given your day in Court to contest the charges of the People.
>
> Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.
>
> Now, what is the decision?" (Appendix, pp. 112-113).

Defense counsel responded that appellee did not desire to withdraw the pleas; that counsel believed that appellee had an absolute right to refuse to withdraw the pleas and to permit them to stand; that defense counsel was not as concerned with appellee's role under indictment 997 as they were with his role under 998 and 999 of 1970; that four indictments were filed against appellee, and if he were found guilty under any one of these, it could expose him to very serious penalties; that appellee had undergone considerable expense in the matter; that these were calculated decisions by all persons concerned and expensive decisions; and that appellee was entitled to specific performance. Accordingly, it was appellee's decision to affirm the pleas. (Appendix, pp. 113-118; 121).

The New York Court of Appeals rejected appellee's contention that he was entitled to specific performance of a promised sentence. The highest state court noted that although the state trial judge "did not expressly condition the prospective sentence upon his information at the time of the plea", he stated that "the prospective sentence was based on information then known and representations then made", and "by the strongest necessary implication, the court was indicating the conditional foundation of the 'promise'". In any case "there are policy considerations which go beyond the literal reading of the plea minutes", in that "any sentence 'promise' at the time of plea is, as a matter of law and strong public policy conditioned upon its being lawful and appropriate in light of the subsequent pre-sentence report or information obtained from other reliable sources." Hence, the fact that the court "did not explicitly condition its 'promise' (although the implication could hardly be clearer) upon its later evaluation after reading the pre-sentence report, or the facts it learned from the trial of the co-defendants, is therefore of no consequence." People v. Selikoff, 35 N Y 2d 227, 237-238 (1974).

The District Judge likewise recognized that appellee was not entitled to specific performance of an alleged promise. Nevertheless, he ruled that due process required the state judge to "vacate the guilty pleas sua sponte, thereby permitting the petitioner to weigh his alternatives of going to trial on all the charges or entering guilty pleas anew without coercion or fear of offending the court." (Appendix, p. 133).

ARGUMENT

THE DISTRICT COURT ERRED IN SUA SPONTE VACATING APPELLEE'S PLEA DESPITE THE FACT THAT THE APPELLEE NEVER SOUGHT AND INDEED HAS PERSISTED IN A DETERMINATION NOT TO WITHDRAW THE PLEA.

This is an anomalous case. Appellee instituted this application for a federal writ of habeas corpus seeking specific performance of a representation by the trial court at the time of appellee's plea to Grand Larceny in the Second Degree that the trial court, upon the facts as it then understood them, would impose no jail term at the time of sentencing.* The District Court, while agreeing with respondent's position

* One week prior to sentencing, the trial court informed the defendant that further facts had come to its attention, that it could no longer comply with its prior representation as to no jail term and the court offered the appellee an opportunity to withdraw his plea.

that appellee was not entitled to specific performance of the trial court's representation at the time of the plea*, strangely held that the trial court sua sponte should have vacated the guilty plea although no such relief was sought by the District Court application.** The District Court stated:

> "The Court concludes that principles of fairness and due process require that he [the trial judge] vacate the guilty plea sua sponte thereby permitting the petitioner to weigh his alternatives of going to trial on all the charges or entering guilty pleas anew without coercion or fear of offending the Court."

This holding is both inappropriate and incorrect. Apart from the promise of no jail sentence, the appellee by his guilty plea received other benefits and adamantly refused to withdraw the plea. The District Court holding, rather than improving appellee's position, might have eliminated his option

* Petitioner did not appeal from this holding of the District Court and it is not before this Court for review.

** Interestingly enough, Judge Bonsal sua sponte reached this conclusion below since it was urged by neither party in the District Court. Indeed, appellee, through all prior state and federal proceedings has adhered to his original determination in the trial court to plead to the reduced charge. At the time of this decision, appellee indicated that he considered the plea a definite benefit to him irrespective of the trial court's statement that it could no longer be bound by its previous representation as to no jail term.

to plea to the reduced charge of grand larceny in the second degree and have operated to force the appellee to go to trial on a multitude of charges including Grand Larceny in the First Degree, notwithstanding that sentence considerations aside, he still regarded the plea as desirable and wanted it to stand. Once the plea was vacated, there was no guarantee that the District Attorney would consent to another plea or that the Court would again accept the reduced plea.

The trial court was concerned that the appellee had pleaded guilty only because of the no jail sentence representation. The trial court stated that it had learned in its discussion with the probation department, that appellee had maintained his innocence to the charges. In this posture, the trial court felt it should offer appellee an opportunity to withdraw his plea. Appellee steadfastly refused and his attorney took great pains to explain to the trial court that his client, notwithstanding the judge's change of position, regarded the plea as beneficial.

Appellee's attorney, citing North Carolina v. Alford, 400 U.S. 25 (1970), pointed out that appellee was entitled to plead guilty notwithstanding these assertions and wished to do so. As he made clear, appellee was quite concerned about the charges in indictments 998/70 and 999/70 which had been covered by his plea to Grand Larceny in the Second Degree in

indictment 997/70. Indictment 999/70 had included a count of Grand Larceny in the First Degree which carried a maximum of fifteen years while Grand Larceny in the Second Degree carried a maximum of seven years. Additionally, petitioner was quite concerned about the expense of having to go through a trial.

This was no hurried decision by appellee and his counsel. The trial court had informed them of its change in position a week prior to sentencing to assure that appellee would have ample time to consult with counsel and weigh his alternatives.

In view of the obvious detriment which would have innured to the appellee if the trial court had sua sponte withdrawn the plea*, and the District Court's failure to articulate the specific reasons for its holding, appellant is unable to fathom the basis for the District Court's concern that appellee was coerced or put in fear by the trial court's granting appellee the opportunity to go to trial on the indictments. Indeed, this is the specific procedure contemplated by the

* Assuming this was even possible under New York law. See Matter of Sekaloff v. Hogan, 41 A D 2d 815 (1st Dept. 1973) and People v. Griffith, 43 A D 2d 20, 24 (1st Dept. 1973)which hold that a state trial judge is without power to withdraw a plea over a defendant's objection ". . .a criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the Court. See Lynch v. Overholser, 369 U.S. at 719, 8 L. ed. 220 (by implication), although the States may by statute or otherwise confer such a right. . ." (Emphasis supplied), North Carolina v. Alford, 400 U.S. 25, 38, n. 11 (1970).

United States Supreme Court in Santobello v. New York, 404 U.S. 257 (1971). If appellee elected to remain with his plea, he was still free to ask for sentencing by a different judge or trial before a different judge if he had some reason for so desiring it. Alternatively, as here, a defendant might feel that he would fare better with the judge to whom his case was already assigned. Appellee's judgment concerning Judge Burchell was correct since he did not sentence appellee to the maximum term for grand larceny in the second degree, imposed no minimum term of imprisonment, resulting in appellee's eligibility for parole after one year, and then went on to permit him to remain free on bail pending appeal. Moreover, throughout the sentencing proceedings, he was particularly solicitous of appellee's rights.

The District Court by vacating appellee's plea was substituting its judgment for the appelee's, when such a vacature would have operated, in appellee's opinion, to his detriment at the time of sentencing in August, 1972.

The District Court has now put the State of New York in the anomalous position of defending appellee's decision in August, 1972 to plead to the reduced charges rather than appellee doing so himself in this Court by its speculation that appellee's decision to plead might have been induced by fear

or coercion notwithstanding that there has never even been any such allegation by the appellee. Moreover, the District Court has formulated a baseless constitutional ruling and applied it to invalidate a state conviction retroactively. Appellee is before this Court on a writ of habeas corpus and is not before this Court on a direct appeal of his judgment of conviction. At least five years have now passed since the appellee committed the crimes to which he pleaded. It will now be difficult, if not impossible, to retry the appellee*. If the guilty plea does not stand, appellee may well be totally absolved from his admitted wrongdoing.**

* Appellee has not cross appealed from the District Court's holding denying him the specific performance he sought in that Court, compelling the conclusion that complete vacature of the plea will innure to his benefit at this late date. This seems particularly unfair to the People of the State of New York who would have been able to retry petitioner in 1972 if he had decided to exercise the option given him to withdraw his plea.

** The District Court granted appellee's application for a writ of habeas corpus, presumably vacating the guilty plea. By the terms of the District Court order, appellee is currently subject to retrial on all four indictments.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE REVERSED.

Dated: New York, New York
July 21, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

WILLIAM RODRIGUEZ , being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for appellant herein. On the 23rd day of July , 1975 , he served the annexed upon the following named person :

IRVING ANOLIK, ESQ.
225 Broadway
New York, New York 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

William Rodriguez
WILLIAM RODRIGUEZ

Sworn to before me this
23rd day of July , 1975

Burton Kerman
Assistant Attorney General
of the State of New York